UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MY FIRST BIKE PRODUCTIONS, INC.,

Plaintiff,

v.

MYSPACE, INC., a Delaware Corporation, d/b/a Myspace.com, DIRECTV, INC., a California corporation, FOX INTERACTIVE MEDIA, INC., a Delaware corporation,

Defendants.

CASE NO. 1:07-CV-0459-RLY-TAB

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANTS' MOTION TO DISMISS

Defendants MySpace, Inc. ("MySpace"), DIRECTV, Inc. ("DIRECTV"), and Fox Interactive Media, Inc. ("FIM") (collectively, "Defendants"), by counsel, pursuant to Fed. R. Civ. Proc. 6(b) and S.D. Ind. L.R. 6.1(b) and 7.1, respectfully submit the following memorandum of law in opposition to plaintiff My First Bike Productions, Inc.'s ("First Bike") Motion for Extension of Time to Respond to Defendants' Motion to Dismiss (Document 15; the "Motion") filed May 16, 2007.

I.
INTRODUCTION

On April 23, 2007, Defendants moved to dismiss First Bike's various causes of action (Document 9). In their memorandum in support of the motion and accompanying affidavits, Defendants presented facts and legal analysis for three independent grounds for dismissal:

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(1) this Court's lack of personal jurisdiction over Defendants, (2) preemption of First Bike's claims by federal copyright law, and (3) First Bike's failure to state claims under Indiana law (Document 10). Without seeking Defendants' approval or moving for an enlargement of time to respond to Defendant's motion to dismiss before expiration of the specified period pursuant to Fed. R. Civ. Proc. 6(b), First Bike chose not to file a response which was due on May 11th.

First Bike now comes to the Court in the Motion with a fabricated story about an agreement "in principal [sic]" which Defendants categorically deny. First Bike asserts without justification that a transfer "will render Defendants' Motion to Dismiss moot," an assertion that is refuted by the motion and supporting materials. First Bike also asserts that it requires thirty days to "determine precisely which District Court in California to which to transfer the case" as opposed to needing thirty days to respond to the motion to dismiss. And in a final contradictory assertion with no factual support, First Bike states that "it expects to have entered into an agreement with Defendants" prior to the expiration of the requested thirty days.

Defendants are taken aback by First Bike's misrepresentations and feel compelled to submit the following facts and authorities in opposition to the Motion.

II.
FACTS

On May 7, 2007, a mere four days before its response to Defendants' motion to dismiss was due, First Bike's counsel telephoned Defendants' counsel with two proposals: (1) an unsolicited request that Defendants agree to transfer this case to California, and (2) a settlement demand consisting of a dollar amount and no other terms. Affidavit of Craig Pinkus ("Pinkus Aff.") attached and incorporated as Exhibit 1, at ¶¶ 2-5. Defendants' counsel agreed to consult with Defendants and respond to the proposals, and he confirmed the parties' conversation in an email on May 9th. Pinkus Aff. at ¶¶ 6-10. At no time during the parties' May 7th conversation did First Bike's counsel request an extension of time to respond to Defendants' pending motion to dismiss. Pinkus Aff. at ¶ 8. Contrary to First Bike's assertion, counsel for Defendants never agreed in principle to a transfer of this case to California. Pinkus Aff. at ¶ 8. Nor are the parties "in discussions" over the transfer of this case. *Id.* at ¶¶ 8-9.

Inexplicably, First Bike simply watched the May 11th deadline for filing its opposition papers pass right by. Four days after the deadline had passed, First Bike's counsel requested for the first time that Defendants agree to an enlargement of First Bike's statutory response time. Pinkus Aff. at ¶ 12. The next day (before Defendants were able to send a written rejection to First Bike), First Bike filed the instant Motion seeking an extension of time to file its opposition papers.

III. ARGUMENT

A. FIRST BIKE'S MOTION IS GOVERNED BY THE EXCUSABLE NEGLECT STANDARD

A motion for enlargement of time that is filed after the expiration of the relevant deadline may only be granted if the moving party's failure to act "was the result of excusable neglect." Fed. R. Civ. Proc. 6(b); *Prizevoits v. Indiana Bell Telephone Company*, 76 F.3d 132, 133-134 (7th Cir. 1996). "To sustain a finding of excusable neglect, the party seeking the enlargement of time bears the burden of proving both good faith and a reasonable basis for not complying within the specified period." *Breslow v. Prudential-Bache Properties, Inc.*, 1994 WL 478611 (N.D. Ill. 1994), * 4; *Prizevoit*, 76 F.3d at 133 ("An unaccountable lapse is not excusable neglect"). This is a "stringent" standard. *Id.*; *Donald v. Cook County Sheriff's Dept.*, 95 F.3d 548, 558 (7th Cir.

1996) ("The requirement that parties who simply ignore deadlines make a showing of excusable neglect should be taken seriously by the district courts").

Excusable neglect refers to those rare instances where a deadline is missed for reasons such as "misrepresentations by judicial officers, lost mail, and plausible misinterpretations of ambiguous rules." *Prizevoit*, 76 F.3d, at 133. Needing more time to prepare a brief is not "excusable neglect." *Id.* Similarly, a party cannot meet its burden of demonstrating excusable neglect merely because its counsel failed to read the rules of procedure. *Id.* In short, a party will not be excused for knowingly "watch[ing] the deadline pass." *Midwest Employers Cas. Co. v. Williams,* 161 F.3d 877, 880 (5th Cir. 1998). This is precisely what First Bike has done.

B. FIRST BIKE FAILS TO ALLEGE, LET ALONE DEMONSTRATE, EXCUSABLE NEGLECT

In its Motion, First Bike completely ignores the excusable neglect standard. First Bike appears to offer four excuses for ignoring the May 11th deadline. It falsely claims the parties had an "agreement in principal [sic]" to transfer this case to California; it claims that such an agreement will be finalized within 30 days; it claims that a transfer to California will moot the issues raised by Defendants' motion to dismiss; and it claims that it needs 30 days to "determine precisely which District Court in California" this case belongs – not to draft its opposition papers. Motion, at p. 2. None of these reasons come close to demonstrating "excusable neglect" for missing the May 11th deadline.

First, First Bike's entire motion is brought in bad faith. *Breslow*, 1994 WL 478611 at *4. Having allowed the statutory deadline to pass, First Bike has concocted a tale of the parties' agreement to transfer this case to California. As shown by the accompanying Affidavit of Craig Pinkus and emails between counsel, no such agreement was ever reached. Pinkus Aff. at ¶¶ 8-9. First Bike submits no support for its claim that an agreement in principle was reached, nor any basis for believing that such an agreement will be finalized within 30 days. Even more troubling, First Bike's motion carefully conceals that its request to Defendants for an extension of time was made four days after the deadline had passed. Motion, p.2; Pinkus Aff. at ¶ 12. First Bike's false and misleading representations to the Court are improper as a matter of law and cannot meet the "good faith" requirement for excusable neglect. *Breslow*, 1994 WL 478611 at *4; Fed. R. Civ. P. 11(b) (by presenting a written motion to the court, the submitting attorney represents the truthfulness of statements of fact to the best of his knowledge, information, or belief).

Second, First Bike's motion offers no reasonable basis for failing to file a timely opposition brief. *Prizevoit*, 76 F.3d at 133; *Breslow*, 1994 WL 478611 at *4. In addition to providing no support for its claim that the parties have agreed to transfer this case, First Bike fails to explain how such a transfer would moot Defendants' pending motion to dismiss. The motion to dismiss does far more than challenge this Court's personal jurisdiction over Defendants; it demonstrates that First Bike's "plagiarism" and misappropriation claims are completely preempted by federal copyright thus warranting their dismissal. Defendants' motion to dismiss also seeks dismissal of First Bike's complaint for failing to state a contract claim and for failing to state a claim under the Indiana Crime Victims Act. Regardless of where this case may be transferred (assuming *arguendo* it does not remain in this Court), First Bike's complaint remains fatally defective as a matter of law.

Finally, First Bike's contention that 30 additional days are needed to pick the appropriate California district court to which this case should be transferred is hardly a reason for granting First Bike more time to file an opposition brief. Putting aside the obvious question of why it would take a month to select an alternate venue, the absence of any acknowledgment by First

Bike that it needs more time to prepare an opposition brief makes its Motion all the more unreasonable.

In short, there is no reasonable basis for any of the excuses proffered by First Bike nor do they amount to excusable neglect. First Bike was not confused by the rules; it was not misled by a judicial officer; and it did not receive the moving papers late. *Prizevoit*, 76 F.3d, at 133. By any measure, First Bike's lack of diligence should not be excused.

IV.
CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny First Bike's motion and preclude First Bike from filing an opposition to Defendants' Motion to Dismiss.

Date: May 18, 2007

Respectfully submitted:

/s/ Craig E. Pinkus

Craig E. Pinkus, Atty. No. 5749-49
Paul D. Vink, Atty. No. 23785-32

BOSE McKINNEY & EVANS LLP
2700 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, IN 46204
Tel: (317) 684-5000 / Fax: (317) 684-5173

Richard L. Stone (*pro hac vice*)
David R. Singer (*pro hac vice*)
HOGAN & HARTSON LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
Tel: (310) 785-4768 / Fax: (310) 785-4601

Attorneys for Defendants, MYSPACE, INC., DIRECTV, INC., and FOX INTERACTIVE MEDIA, INC.

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2007, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Mark R. Waterfill
mwaterfill@dannpecar.com

Michael A. Lang
mlang@dannpecar.com

/s/ Craig E. Pinkus
Craig E. Pinkus